EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Neilan**

Respondent: **Gildacroft Limited**

Heard at: **East London Hearing Centre**

On: **Friday 10 August 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **Mr K Wong (Lay Representative)**
Respondent: **Ms K Zakrzewska (Litigation Executive)**

JUDGMENT having been sent to the parties on 17 August 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By claim form presented to the Employment Tribunal on 12 February 2021, the Claimant brought claims of unfair dismissal, for a redundancy payment, notice pay, holiday pay and arrears of pay in respect of his employment by the Respondent as a carpenter from 1 July 1998.

2. In the ET1, the Claimant stated that employed terminated on 8 February 2021. In its Response denying that any sums were due to the Claimant, the Respondent maintained that employment had not terminated: the Claimant had not been dismissed nor had he resigned. At the outset of today's hearing, I canvassed the position with both representatives and each confirmed that employment was indeed ongoing, albeit no work has been performed for quite some time. As there is no dispute that the Claimant continues to be employed, the Tribunal lacks the jurisdiction to hear the claims for unfair dismissal, breach of contract and redundancy payment as each are claims that arise on termination of employment. For those reasons, the claims are struck out for lack of jurisdiction and I have made no finding on whether or not they were well founded.

Findings of Fact and Conclusions

3. The Claimant has provided services for many years to the Respondent company, initially as a self-employed contractor. He signed a contract of employment on 12 October

2013 which expressly states that he is a salaried employee and dates his service back to 1 July 1998. The contract requires the Claimant to provide time sheets in order to claim pay for hours worked. There is no guaranteed minimum number of hours of work but nor is it a zero hours contract.

4. The contract provides that the Claimant is entitled to 28 days' paid holiday after one full year of service, pro rata after the first six months, to include all Bank Holidays. The Claimant was required to inform the Respondent at least one month in advance of leave he wished to take. There is no reference in the contract providing that the holiday year runs from 1 April to 31 March. Indeed, the holiday year is not specified in this contract at all. A revised contract of employment sent to the Claimant on 1 February 2020 purported to introduce the April to March holiday year. The Claimant did not sign that contract, he did not accept the terms of that contract and he did not work under that contract. In the circumstances, I find that the original 2013 contract remained in force.

5. The only other evidence relied upon by the Respondent in support of its contention that the holiday year ran from 1 April to 31 March is the provision of a P60. I accept Mr Wong's submission that a P60 is relevant for HMRC purposes only, it provides no assistance in deciding the holiday year for the purposes of calculating the Claimant's entitlement to paid holiday.

6. In the absence of any expressly agreed holiday year, the Working Time Regulations provide that the holiday year will run from the commencement of employment. Whilst the 2013 contract was signed in October the commencement of employment date is 1 July. For these reasons, I conclude that the Claimant's holiday year ran from 1 July to 30 June.

7. During 2019/2020 the Respondent experienced a downturn in work and closed its workshop. As a result, and with the knowledge of the Respondent, the Claimant began to undertake some ad hoc self-employed work in addition to his work for the Respondent. In the circumstances, the separate self-employed work was additional to his employed work and the employment relationship was not terminated.,

8. The Claimant was paid late in December 2019, January 2020, February 2020 and April 2020. Due to previous late payment, in February 2020 the Claimant refused to undertake work for the Respondent on a job in Wimbledon as he feared that he would be left out of pocket. He refused the Wimbledon work on 17 February 2020, 23 March 2020 and 28 May 2020. With the exception of one day of remedial work at Westfield shopping centre in Stratford in April 2020, the Claimant has undertaken any work for the Respondent since January 2020. However, as I say, both parties regard the employment relationship as ongoing and the situation is complicated by the national lockdown by reason of the Covid-19 pandemic which effectively stopped all but essential work from 23 March 2020 for a period of some months.

9. The Claimant pressed for the payment of his outstanding wages and was finally paid on or about 1 June 2020. On the same day, Mr Kara (a Director of the Respondent) wrote to the Claimant requiring him to attend a disciplinary meeting the reason to discuss his continued refusal to attend site. At the time, the only active site at which the Respondent was working was Wimbledon but when another site later became available, it was not offered to the Claimant.

10. The Claimant replied the same day, stating that he was surprised to receive the letter. He complained about late payment of wages, the continued failure to pay for the two May Bank Holidays and that he had not been allocated any work for months but had not been put on furlough or made redundant. The Claimant said that the Respondent had failed to honour its contractual obligation to pay for half of the insurance on his work van and that that had not been done. He concluded by stating that he may have grounds for constructive dismissal and that he was owed for the Bank Holidays and his annual holiday. The Respondent did not reply to the letter.

11. Sometime in or around October 2020, the Claimant was removed from the Respondent's Group WorkSave pension plan. A letter from Legal & General, the scheme administrators, does not state that this was because his employment had attended.

12. On 23 October 2020, the Respondent again invited the Claimant to attend a disciplinary hearing to discuss allegations of refusal to attend sites for work because he would only work within Newham. The letter enclosed the new 2020 contract upon which the Respondent purported to rely. On 3 November 2020 the Claimant objected to attending a disciplinary hearing and raised a formal grievance. Amongst other things, his grievance included complaints about outstanding pay, expenses, 50% of his van insurance, holidays and Bank Holidays. He concluded that he would attend a disciplinary hearing once his grievance had been investigated and resolved. This exchange of correspondence is consistent with the parties' mutual belief that the employment was still ongoing. The Claimant requested a breakdown of the number of holidays for which he had been paid in 2019/20.

13. The Respondent did not reply until 23 November 2020. It invited the Claimant to attend a grievance hearing on 25 November 2020. When asked in evidence why, having waited for three weeks to respond to the Claimant's letter he gave only two days' notice of the meeting, Mr Kara was unable to provide a response other than to suggest it was a "spur of the moment thing". I conclude that two days' is clearly an inadequate period of notice for a grievance hearing in the circumstances for which there is no reasonable explanation. The three week delay in arranging a hearing and giving only two days' notice was an unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. This was a point made by the Claimant in his letter of 24 November 2020 in which he said that it was unreasonable to expect him to obtain a colleague/trade union companion in that time and requested that copies of all relevant documents be provided.

14. Despite the Claimant's objections, the grievance hearing was not rescheduled and it proceeded in the Claimant's absence. I conclude that this was a further unreasonable failure to comply with paragraphs 33 and 34 of the ACAS Code of Practice.

15. The grievance was heard by a consultant, Ms MacLeod and she produced a report dated 30 November 2020. Included within her report is a letter from the Claimant to Mr Kara on 26 November 2020 in which he again asked for relevant documents, including evidence of the number of days' holiday paid in 2019/20 and payment of the insurance for his van. Mr Kara did not respond to the Claimant's letters to suggest that the Claimant was not entitled to payment for his van insurance.

16. At paragraph 18 of her findings in the grievance report, Ms MacLeod set out Mr Kara's responses to the points raised by the Claimant in his letter dated 26 November

2020. In response to the request for evidence of payment of the van insurance, Mr Kara replied "**we have not paid for your van insurance it is not the company's responsibility for personal vehicles**". In response to the request for a summary of holidays, Mr Kara stated that one had not previously been requested by the Claimant. At paragraph 30 of the report, Ms MacLeod records that another employee, Ms Drew, stated that a previous director had paid for insurance on the Claimant's van as a private agreement but that Mr Kara did not agree that it was a contractual obligation. Ms MacLeod recommended that the Claimant's grievance should be rejected in its entirety.

17. Contained within the bundle is an email from Mr Fox, the former director in question. It was sent on 12 April 2021 and it confirms that during his time as a director until his retirement on 4 October 2019, the Respondent had always paid the Claimant 50% of his van insurance as he used it for company business. On balance, I accept that the Claimant has shown that there was a contractual entitlement to be paid 50% of his van insurance. Mr Fox was a director at the time of the agreement, he had actual and ostensible authority to bind the Respondent. Although not recorded in the written contract of employment, it was an orally agreed express term of the contract and the Claimant is entitled to payment for50% of the cost of his van insurance. Having seen the renewal quote, the appropriate amount is £511.43.

18. Turning next to the question of pay and holiday, the Claimant has provided a detailed analysis of attendance records, resource activity sheets and compared them with the payslip. He confirms on oath that the contents are accurate. Mr Kara had not double checked the figures and could point to no specific inaccuracies. On balance, and with no good reason to doubt the accuracy of the Claimant's figures, I accept the Claimant's evidence as reliable. His analysis shows an underpayment of 7½ days. His daily rate was £130, and he is therefore entitled to the sum of £975 as unauthorised deduction from wages.

19. The Claimant refers in his witness statement to there being an additional sum with regard to holidays taken but not paid in 2019/20. His analysis does not support this and, on balance, I am not satisfied that he is entitled to payment for these five days.

20. As for annual leave generally, the leave year runs from 1 July. The claim was submitted in February 2021 and, as the Claimant remained employed throughout, entitlement to annual leave accrued throughout the entirety of that period. In correspondence during the relevant period, the Claimant referred to pay for holiday. Regarding his correspondence overall, and mindful of the employer's responsibility to ensure that employees have an adequate opportunity to take paid leave under the Working Time Regulations, I have construed the Claimant's letters as a request for paid holiday to which the Respondent did not object. The Claimant was absent throughout, including on Bank Holidays, which would otherwise have been taken as paid holiday. On the particular facts of this case, I conclude that the Claimant has effectively taken his holiday entitlement during the balance of the leave year 2019/20 and in 2020/21 and has not been paid for the same. For those reasons, I am satisfied that there has been an underpayment in respect of holiday up to and including the date of the presentation of the complaint.

21. The parties agree that the entitlement would be 28 days' for the period to the presentation of the claim on 12 February 2021, at a daily rate of £130, this gives a sum of £3,640. The parties also agree that the Claimant would be entitled to leave accrued in the

balance of the leave year to 20 June 2021. This is a period of 19 weeks and 5 days, in other words 38% of the annual entitlement which, multiplied by 28, gives an entitlement to 10.64 days. Rounded to 11 days, at a rate of £130 per day, the Claimant is entitled to a further payment of £1,430. The total of £5,070 pays in full the Claimant for all of his outstanding holiday up to and including 30 June 2021. Any holiday accrued after 1 July 2021 falls within the new leave year which does not form part of this claim.

22. I turn finally to the ACAS Code of Conduct. The Tribunal has the ability to uplift an award by the sum of 25% or up to 25% in the event of an unreasonable failure to comply with an ACAS Code. In this case, the ACAS Code of Practice on Disciplinary and Grievance Procedures applies. For reasons I have given, the Claimant raised a grievance on 3 November 2020, there was an unreasonable failure in respect of the short notice for the grievance hearing and also proceeding in his absence. I am satisfied that an uplift is appropriate. In deciding the amount of the uplift however I take into account that the Respondent did not entirely ignore the Claimant’s grievance, it did invite him to a hearing albeit on short notice, it did consider to some extent that grievance albeit in his absence and it did provide the Claimant with the opportunity to appeal.

23. For those reasons I am satisfied that the appropriate uplift is 10% only. The total award therefore for the Claimant damages of £6,556.43 10% ACAS uplift £655.64, the Respondent must pay the total sum of £7,212.70 to the Claimant within 28 days.

Employment Judge Russell
Dated: 22 December 2021